STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. PEN-15-555

DAY'S AUTO BODY, INC.

Plaintiff/Appellant

v.

TOWN OF MEDWAY
and
EMERY LEE AND SONS, INC.

Defendants/Appellees

On Appeal from a Judgment of the Superior Court, Penobscot County

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REPLY BRIEF OF APPELLANT

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The Town seeks to distinguish between fire hoses and the fire truck to which they are connected. This is akin to trying to distinguish between the door to a vehicle and the vehicle itself. They are a single entity. Moreover, 14 M.R.S.A. §8104-A(1) is directed both to negligent acts and negligent omissions by a governmental entity. Failing to properly use the hose attached to a fire truck is a negligent use of equipment. It is functionally no different from failing to use the brake on an automobile to bring it to a stop.

It does not help the Town to focus on such items as holding tanks, nozzles, and hydrants. The nozzle is a functional part of the hose, which is the functional part of the fire truck. Failing to appropriately refill the tanks of a fire truck at the nearest available hydrant necessarily involves the negligent use of a fire truck. Similarly, failure to appropriately fill a holding tank involves the negligent use of a fire truck. The focus for this Court should be whether the complaint alleges that either a fire truck or an excavator were negligently used and that necessarily includes any equipment attached to either used in fighting the fire.

While a fire hose does not have the power to move on its own, neither does the individual component of any motor vehicle. The core question is whether the excavator and the fire trucks fit within any of the express exceptions to the Maine Tort Claims Act ("M.T.C.A.").

Both a fire truck and an excavator fit within the exception found at Section 8104-A(1)(A)

as they are motor vehicles as defined at 29-A M.R.S.A. § 101, subsection 42. That includes any "self-propelled vehicle" with several limited exceptions, none of which here apply. Similarly, both the fire truck and an excavator meet the definition of special mobile equipment found at 29-A M.R.S.A. § 101, subsection 70, which is also expressly exempted from immunity pursuant to Section 8104-A(1)(B) of the M.T.C.A. It is not, as the Town suggests at page 16 of its brief that appellant is suggesting "some involvement that Town fire trucks had in the fire-fighting effort." One primarily fights a fire with fire trucks and these fire trucks were negligently used. For the fire trucks, the negligence consisted primarily of acts of omission. For the excavator, the negligence consisted of acts of commission.

The Town's reliance upon Thomspon v. Dept. of Inland Fisheries & Wildlife, 2002 ME 78, 796 A.2d 674 is misplaced. The plaintiff in Thompson framed the issue not on how vehicles were used, owned or maintained, but on how those vehicles were equipped. The plaintiff there claimed that better equipment should have been placed on both the helicopter and road vehicles and that the helicopter should have been supplied with more gasoline. 2002 ME 78, ¶2, 796 A.2d at 675. Once those vehicles were put into use, there was no allegations they were used negligently. Nor was there an allegation that they were maintained negligently. Appellant here is not claiming that these fire trucks should have been better equipped. It is claiming that the fire trucks, if properly used, could have quickly suppressed the fire.

Nor is the Town helped by this Court's decision in New Orleans Tanker Corp. v. Dept. of Transportation, 1999 ME 67, 728 A.2d 673. There, the sole issue for this Court was whether stationary bridge leaf machinery fell into the catchall exception of Section 8104-A(1)(G) of the M.T.C.A. Here, Plaintiff is relying expressly upon Sections 8104-A(1)(A) and (B). There should

be no issue that both an excavator and fire truck are motor vehicles and/or special mobile equipment. This Court's emphasis on mobility in New Orleans Tanker Corp. was to determine how to interpret the catchall provision, not to determine what the Legislature means by the phrase "negligent acts or omissions in [the] ownership, maintenance or use" of that equipment. 14 M.R.S.A. §8104-A(1). Stationary motor vehicles can create a hazard, if used. A governmental employee who negligently opens a car door so as to create a collision with a bicyclist is covered for a claim brought under the M.T.C.A. Similarly, a town which failed to properly maintain a vehicle with a leaking gas line which was left in a citizen's driveway and led to a vehicle fire followed by a house fire, would be similarly liable. The Town is confusing whether a particular item is machinery or equipment within the meaning of the M.T.C.A. with the breadth of liability for negligent use and omission which would apply once the decision that the item is vehicle, machinery, or equipment was made.

Nor is the Town aided by Brooks v. Augusta Mental Health Institute, 606 A.2d 789 (Me. 1992), because this Court expressly found that "the gravamen of [the] claim is not the defendant's negligent operation, use or maintenance of the bus, but the monitoring and supervision of the decedent." 606 A.2d at 790. (emphasis added).

The claim at page 20 of the Town's brief that the M.T.C.A. plaintiff must show that he was "harmed by contact" with municipal machinery flies in the face of the express language of Section 8104-A. The simple question this Court must ask is whether Appellant is claiming negligent use of Town motor vehicles and special mobile equipment, whether they be acts of omission (the fire trucks) or acts of commission (the excavator).

B. THE SUPERIOR COURT ERRED IN HOLDING THAT FIGHTING A FIRE WAS A DISCRETIONARY ACT FOR WHICH THE TOWN OF MEDWAY WAS IMMUNE.

The Town misapprehends the import of 14 M.R.S.A. §8111(1) in stressing, at page 23, that discretionary function immunity protects "all government employees." Tellingly, the Town eliminates the qualifying language found within §8111(1) which states that the immunity "shall be available to all governmental employees." (emphasis added). That immunity is simply "available" doesn't mean that every act by every governmental employee is protected by immunity.

The best case on the application of discretionary immunity remains Jorgensen v. Dept. of Transportation, 2009 ME 42, 969 A.2d 912. There, as here, the four part test for analyzing the applicability of discretionary function immunity rests on the third of four questions. Appellant readily concedes that the other three questions are answered in favor of the Town. Thus, the sole question for this Court is: "Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?" 2009 ME 42 at §17. Here, the decision of whether to fight a fire is distinct from how one fights the fire. The firefighting took place over a lengthy period of time. Many ministerial, or operational, choices were available. As the fire wound down, the decision to use an excavator was even more ministerial. This case is very similar to Tolliver v. Dept. of Transportation, 2008 ME 83, 948 A.2d 1223. There, this Court held: "When, however, MDOT has determined the traffic control devices such as white edge lines, are necessary for the public's safety, the implementation of that decision on a day-to-day operational level is no longer discretionary, but rather is a ministerial act to be carried by MDOT employees." 2008 ME 83 at ¶24.

Many of the acts of negligent use of the fire trucks involved actions which defied logic, rather than implemented considered policy concerns. Sending every fire truck to the same hydrant when there were several hydrants available, refusing to pump water from a river that was 200 yards away, continually pulling a fire truck into the scene of the fire rather than backing it in to facilitate the transfer of water to holding tanks were all decisions that required not a weighing of policy concerns but the simple exercise of common sense. They are classically negligent and not subject to any discretionary immunity.

Tellingly, the Town makes no attempt to distinguish decisions in Massachusetts, Alaska, and Minnesota which found that the hour-by-hour decisions as to how to fight a fire are not subject to the similar discretionary immunity provisions in the laws of those states. Harry Stoller & Co., Inc. v. City of Lowell, 587 N.E.2d 780 (Mass. 1992); Angnabooguk v. State of Alaska, 26 P.3d 447 (Ak. 2001) and Invest Cast, Inc. v. City of Blaine, 471 N.W.2nd 368 (Minn. App. 1991). Appellant would refer the Court to its argument at pages 14 through 16 of its initial brief for why the decisions by those three Courts should be followed here. None of the decisions here involve policy or planning considerations and this case is truly indistinguishable from both Jorgensen, *supra,* and Tolliver, *supra.*

II. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT EMERY LEE AND SONS, INC.

A. THE SUPERIOR COURT ERRED IN DETERMINING THAT EMERY LEE AND SONS, INC. WAS ENTITLED TO IMMUNITY BECAUSE IT WAS ACTING AS AN EMPLOYEE OF THE TOWN, RATHER THAN AN INDEPENDENT CONTRACTOR.

It is true that as a general matter of statutory construction, the word "person" can be construed to include a corporation as opposed to an individual person. 1 M.R.S.A. § 72(15).

However, that rule of construction is not applicable where "such construction is inconsistent with the plain meaning of the enactment, the context otherwise requires or definitions otherwise provide." 1 M.R.S.A. § 72. Here, such a construction is contrary to the plain meaning and context of 14 M.R.S.A. § 8102. Section 8102, in defining "employee," provides:

> "Employee" means a person acting on behalf of a governmental entity in any official capacity, whether temporarily or permanently, and whether with or without compensation from local, state or federal funds, including elected or appointed officials; volunteer firefighters as defined in Title 30-A, section 3151; emergency medical service personnel; members and staff of the Consumer Advisory Board pursuant to Title 34-B, section 1216; members of the Maine National Guard but only while performing state active service pursuant to Title 37-B; sheriffs' deputies as defined in Title 30-A, section 381 when they are serving orders pursuant to section 3135; and persons while performing a search and rescue activity when requested by a state, county or local governmental entity, but the term "employee" does not mean a person or other legal entity acting in the capacity of an independent contractor under contract to the governmental entity.

14 M.R.S.A. § 8102(1). This language does not lead to the conclusion that Emery Lee would draw: that a legal entity not acting as an independent contractor may be an employee; rather, it leads to the logical conclusion that a legal entity other than an individual person may not be an employee under the Act.

Utilizing the rule against surplusage, as Emery Lee exhorts the Court to do at page 17 of its brief, the language "or other legal entity" would be mere surplusage, meaning nothing at all, if the statute meant what Emery Lee suggests that it does. If the word "person" were already intended to include other legal entities such as corporation, there would be no need for the phrase "or other legal entity" in the last sentence of Section 8102(1) and that language would be a nullity. That could not be what the Legislature intended. Rather, in referring to a "person" who may be an employee, the Legislature gave several examples, all of whom are individual persons

rather than corporations (elected or appointed officials, volunteer firefighters, emergency medical service personnel, etc.). As such, the Legislature recognized that only individual persons may be employees. In referring to a person "or other legal entity" acting in the capacity of an independent contractor, the Legislature was recognizing that not all individual persons will be employees, but rather some will be acting as independent contractors, and that all legal entities other than individual persons would necessarily be acting as independent contractors.

This same conclusion is also reached by application of the doctrine *expressio unius est exclusio alterius*- the mention of one thing is the exclusion of the other - that Emery Lee relies upon at page 16 of its brief. In defining employee, Section 8102(1) refers only to "a person"; however, in excluding independent contractors, Section 8102(1) refers both to "a person" and "other legal entity." Therefore, the mention of only "a person" in defining who may be an employee is the exclusion of other legal entities as potential employees.

Under the plain language of the statute, therefore, a corporation may not be an "employee" of a governmental entity entitled to immunity under the Tort Claims Act. The Superior Court erred in determining otherwise.

Even if a corporation could, under some circumstances, be an "employee," however, the facts of this case do not preclude the possibility that the corporation, Emery Lee and Sons, Inc., was acting as an independent contractor rather than an employee, and it was error for the Superior Court to grant summary judgment on that basis as a matter of law. When a certain set of facts could reasonably be interpreted either to create or not create an employee relationship, it is a question of fact for the factfinder. Ricci v. Barr, 2012 Me. Super. LEXIS 152, n. 2 (citing Timberlake v. Frigon & Frigon, 438 A.2d 1294, 1296 (Me. 1982)).

Here, the facts relevant to the issue of whether Emery Lee and Sons, Inc. was an employee or an independent contractor of the Town of Medway are disputed, and a reasonable factfinder could conclude that Emery Lee was acting as an independent contractor. As set forth in Plaintiff's primary brief on appeal, application of the 8-factor test weighs strongly towards finding that Emery Lee was an independent contractor. Emery Lee would have the Court ignore seven of the eight factors and rely solely on the fact that Emery Lee took direction from the Town of Medway at the scene of the fire as evidence that Emery Lee was not an independent contractor; however, that is not what the law provides.

Emery Lee claims there is no evidence in the record of whether there was a contract for the performance of the work at a fixed price - however, the only record evidence is a bill submitted by Emery Lee and Sons, Inc. to the Town of Medway for 4 hours of work at the rate of $250.00 per hour. Whether Emery Lee and the Town had previously contracted for that rate is not a matter of record, and thus the "contract for a fixed price" factor is inconclusive. Emery Lee's business is a distinct calling, and it employs assistants as part of its business (as evidenced by the fact that Mr. Lee's daughter, Cathy Small, an employee of Emery Lee and Sons, Inc., initially took the call from the Medway Fire Department). Emery Lee furnished its own tools for the fire suppression efforts, an excavator owned by the company. Emery Lee's operation of that excavator at the scene of the fire was under its exclusive control; although the Town of Medway gave some direction as to the best use of the excavator, Emery Lee was free to control the progress of its own work. Emery Lee was on site for only four hours, which again points to independent contractor status rather than employee status. There is no evidence to suggest that operation of an excavator is part of the regular business of the Town of Medway Fire

Department.

These facts simply do not lead to the conclusion that Emery Lee was an employee, rather than an independent contractor, of the Town of Medway Fire Department as a matter of law. Because there are disputed issues of material fact, summary judgment was inappropriate.

B. EVEN IF EMERY LEE HAD BEEN ACTING AS AN EMPLOYEE OF THE TOWN OF MEDWAY, OPERATING AN EXCAVATOR AT A FIRE SCENE IS NOT A DISCRETIONARY FUNCTION TO WHICH IMMUNITY WOULD APPLY.

Appellant refers the Court to its arguments at Section 1 B above and its arguments at pages 18 through 20 of its initial brief. Most decisions made at the scene of the fire do not require balancing of public policy considerations. Emery Lee arrived at the scene four hours after the fire began and, by the time he arrived, the fire had largely subsided and all that was arising from the fire scene at that time was what might have been either smoke or steam. PSAMF ¶¶28-30 (A-53). Mr. Lee then began disturbing parts of the fire and actually created flames which rose two to three fee high. PSAMF ¶32(A-54). Finally, he struck and ruptured two oil tanks and literally added fuel to the fire, creating flames that shot 60 feet high. PSAMF ¶34 (A-54). This conduct was purely operational and involved no decisions involving policy or planning. He did not weigh competing policy concerns, but foolishly stoked a fire that had subsided. As detailed at page 20 of Appellant's initial brief, Emery Lee, over the course of three hours, moved and destroyed valuable metal equipment which had not been damaged by the fire and was not flammable. This equipment was damaged by the time Mr. Lee had finished working with the excavator.

The notion, at page 27 of Emery Lee's brief, that fire suppression "does not resemble activities that are carried on by people generally" is incorrect. Individuals suppress fires all the

time and often succeed in that suppression effort without ever needing to call a fire department. In some states, the fire suppression efforts are carried on entirely by for profit companies. Here, the fire had ended, for summary judgment purposes, and what Emery Lee did was to destroy valuable machinery that had not been damaged by the fire and was salvageable or completely useable. Similarly, by the end of his three hour effort, Emery Lee had, by rupturing two oil tanks, created an inferno.

The actions by an independent contractor beginning four hours after the fire began and extending over the course of three hours, are not the types of split-second decisions that have been found by this Court to be subject to discretionary immunity such as electing to respond to an emergency at high speed, Norton v. Hall, 2003 ME 118, ¶9, 834 A.2d 928, 931, or deciding not to tell prospective foster parents that the foster child they were adopting had previously made false sexual abuse claims. Polley v. Atwell, 581 A.2d 410, 413 (Me. 1990).

Ultimately, Emery Lee and Sons, Inc. is not entitled to discretionary immunity if this Court determines it was not an employee or that there was at least a factual issue as to whether it was an employee. Similarly, Emery Lee and Sons, Inc., to avail itself of a discretionary immunity defense, must establish that it has not purchased insurance coverage which would waive that immunity. However, the core factual point is that using an excavator for three hours to pick up equipment in the building, which had neither been damaged and was not flammable, and move it to a pile in the center of the still smoldering building involved no weighing of competing policy concerns for which discretionary immunity should apply.

C. THE SUPERIOR COURT ERRED IN DETERMINING THAT EMERY LEE AND SONS, INC. WAS ENTITLED TO SUMMARY JUDGMENT EVEN THOUGH IT FAILED TO DEMONSTRATE THE ABSENCE OF LIABILITY INSURANCE COVERAGE.

Emery Lee argues that Section 8112(9) of the Maine Tort Claims Act does not act as a waiver of an employee's immunity from suit, but only applies when the employee is otherwise liable under the Act. That argument ignores the plain language of Section 8112(9), which provides that in suits arising out of an employee's use of a privately owned motor vehicle, "the employee of the governmental entity and the owner of the privately owned vehicle may be held liable for the negligent operation or use of the vehicle but only to the extent of any applicable liability insurance..." That language does not apply to defense or indemnification only, but expressly provides for liability of a government employee, and the owner of the vehicle, for negligent operation or use of a privately owned vehicle. Thus, if Emery Lee was acting as an employee of the Town of Medway, as it claims, it "may be held liable" for the negligent operation or use of the excavator which it was operating at the scene of the fire.

The case law cited by Emery Lee is not to the contrary. See Moore v. City of Lewiston, 596 A.2d 612 (Me. 1991); Grossman v. Richards, 1999 ME 9, 722 A.2d 371; Napier v. Town of Windham, 187 F.3d 177 (1st Cir. 1999). None of those cases involved the use of a privately owned motor vehicle by a governmental employee. Those cases merely stand for the proposition that although Section 8116 waives immunity for the governmental entity itself if it has purchased liability insurance, it does not waive immunity for an employee of the governmental entity merely because the entity has purchased insurance. That issue is not applicable to the present case. Here, the Town of Medway has expressly disavowed the existence of insurance coverage

for the Town that waives immunity; however, Emery Lee had business insurance which may or may not apply to the incident alleged in Day's Auto Body's complaint in this case - whether or not coverage exists under that policy is not a matter of record in this case, since Emery Lee's motion for summary judgment never mentioned the existence or non-existence of insurance coverage for Plaintiff's claims.

Emery Lee would not, as a matter of law, be immune from liability for the negligent operation or use of the excavator, a privately owned motor vehicle[1], to the extent of any applicable insurance coverage. Because Emery Lee's motion for summary judgment failed to negate the existence of applicable liability insurance coverage, Plaintiff never had the burden of arguing that such coverage existed. See Corey v. Norman, Hanson & DeTroy, 1999 ME 196, ¶ 9, 742 A.2d 933, 938, in which this Court held:

> We have stated generally that to resist a summary judgment motion "a plaintiff must establish a prima facie case for each element of his cause of action." Barnes v. Zappia, 658 A.2d 1086, 1089 (Me.1995). By that statement, however, we do not intend that a plaintiff must establish in the written material filed in opposition to a motion for summary judgment a prima facie case for those elements of the cause of action not challenged by the defendant. *Cf.* Binette v. Dyer Library Ass'n, 688 A.2d 898, 903 (Me.1996) (holding that where defendant moved for a summary judgment and did not contest the first element that plaintiff was required to prove, it was assumed that the plaintiff had established a prima facie case for that element).

Because Emery Lee never raised the issue of liability insurance coverage, it was not incumbent on Plaintiff to prove the existence of liability insurance coverage that would operate as a waiver of Emery Lee's immunity from suit under Section 8112(9). Thus, contrary to Emery Lee's

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[1]Emery Lee has made no argument on appeal that an excavator is not a "motor vehicle" within the meaning of Section 8112(9); thus, any such argument it made in the Superior Court has been waived on appeal.

footnote 25 at pages 30-31 of its brief, Plaintiff could not have waived this argument by failing to raise it until its motion for reconsideration of the Superior Court's determination of Emery Lee's motion for summary judgment. The burden of establishing the absence of insurance coverage was always upon Emery Lee. The burden of establishing the absence of insurance coverage was always Emery Lee's.

CONCLUSION

For the foregoing reasons, the Superior Court erred in granting summary judgment to both the Town of Medway and Emery Lee and Sons, Inc. in this case. The summary judgments should be vacated in their entirety and this case should be remanded to the Superior Court for trial.

Dated at Bangor, Maine this 17th day of March, 2016.

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CERTIFICATE OF SERVICE

I, Arthur J. Greif, Esq., Attorney for Appellant, hereby certify I have made due service of the within Reply Brief of Appellant by mailing two conformed copies thereof by regular course of the United States mail, postage prepaid, to counsel for Appellees at the following addresses:

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